

## Immigration Law for the Criminal Defense Attorney

November 22, 2021

Charles A. Phipps  
cp@charlesaphipps.com  
803-238-5919 (mobile)

## Hypothetical #1

- Lawful permanent resident Margaret
- Gets mad at Amazon delivery person walking through her finely manicured front yard
- Shoots a gun as the delivery person leaves; bullet goes through the delivery van
- Charged with discharge of a firearm into an occupied vehicle (SC Code § 16-23-440(B)). This is a felony with a sentence up to 10 years.

## Hypothetical #2

- Mario is in the United States with no legal status
- Mario's employer has an audit of their I-9 forms conducted by federal immigration officials
- They discover that Mario has given the employer a name and social security number belonging to someone else
- Mario is charged with forgery, S.C. Code § 16-13-10(C). This is a misdemeanor with a maximum possible sentence of 3 years.

## General Overview: Types of Immigration Status

- A person not in the U.S. lawfully
- The person entered lawfully on a temporary visa but did not leave
- The person entered unlawfully

## General Overview: Types of Immigration Status

A person lawfully in the U.S. temporarily

- Tourists

## General Overview: Types of Immigration Status

Tourist visas

- Tourist visa applied for at consulate
- Visa Waiver countries: <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>
- Canadians



## General Overview: Types of Immigration Status

Other types of temporary status:

- Students
- Temporary work visas
- Asylees and refugees
- DACA
- Temporary Protected Status (TPS)

## General Overview: Types of Immigration Status

Other types of temporary status:

- U visa for certain crime victims



## General Overview: Types of Immigration Status

- Lawful permanent resident status
- U.S. citizen by naturalization
- U.S. citizens born abroad



## General Overview: Federal Entities

### DHS (U.S. Department of Homeland Security)

- USCIS (U.S. Citizenship and Immigration Services)
- ICE (Immigration and Customs Enforcement)
- CBP (Customs and Border Protection)

### U.S. Department of Justice

- EOIR (Executive Office for Immigration Review)

Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, Department of Homeland Security. The form is divided into two main sections: Part 1, Information About Attorney or Accredited Representative, and Part 2, Eligibility Information for Attorney or Accredited Representative. Part 1 includes fields for USCIS Online Account Number, Name of Attorney or Accredited Representative (Last, First, Middle), Address of Attorney or Accredited Representative (Street, Apt, City or Town, State, ZIP Code, Postal Code, Country), and Contact Information of Attorney or Accredited Representative (Home Telephone Number, Mobile Telephone Number, Email Address, Fax Number). Part 2 includes fields for Select all applicable items, Bar Number (if applicable), and Name of Law Firm or Organization (if applicable). The form also includes checkboxes for 'I am an attorney eligible to practice law in...' and 'I am an accredited representative of the following qualified immigrant...'.

## General Overview: Example #1

John is a lawful permanent resident. He is arrested for simple possession of marijuana. You represent him.

- What is his status?
- What agencies might you interact with?
- What are possible consequences of a conviction?

## General Overview: Example #1

- His status? He is a lawful permanent resident. John is **not** a U.S. citizen.
- Federal entities? ICE, EOIR
- Possible consequences: Lawful permanent residents **can** be deported

## General Overview: Example #2

- Mary is a student at U.S.C. in the United States on a student visa.
- She wants to marry U.S. citizen Pat but she's been arrested on a DUI.

## General Overview: Example #2

- What is Mary's status? Temporary student.
- What might she want? Citizenship? Lawful permanent resident status?
- Does LPR status come automatically upon marriage?
- Federal agencies: USCIS, ICE

## Why Does this Matter to You?

*Padilla v. Kentucky*, 130 S. Ct. 1473 (2010): “When the [immigration] law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”

## *Padilla v. Kentucky*

Defendant was a Lawful Permanent Resident

He was driving a tractor trailer with a large amount of marijuana

Attorney told him that he “did not have to worry about immigration status since he had been in the country so long”

## Major Categories of Crimes: Aggravated Felonies

- Murder, rape, or sexual abuse of a minor, trafficking in a controlled substance, trafficking in firearms, child pornography, espionage, alien smuggling, counterfeiting passports, perjury, and many others.
- A crime of violence “for which the term of imprisonment is at least 1 year.” INA § 101(a)(43)(F).
- A theft offense or burglary offense “for which the term of imprisonment is at least 1 year.” INA § 101(a)(43)(G).

## Consequences of AF

- Ineligible for almost all forms of relief in immigration court
- Additional penalties if the person is removed and attempts to re-enter the U.S. unlawfully

## Major Categories of Crimes: Crimes Involving Moral Turpitude

- **CIMTs:** “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of: (1) a crime involving moral turpitude . . . is inadmissible” INA § 212(a)(2)(A)(i)
  - Certain exceptions if committed under 18
  - Exception if the **maximum penalty did not exceed imprisonment for one year (and, if convicted, the person not sentenced to a term more than 6 months)**

## CIMTs

- What is a CIMT? “conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . .” *Matter of Franklin*, 20 I & N Dec. 867 (BIA 1994)
- No cases examine specific SC crimes

## Major Categories of Crimes: Drug Crimes

- **Controlled substances.** “any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of: (II) a violation of . . . any law . . . relating to a controlled substance . . .” INA § 212(a)(2)(A)(i)
- A waiver is available “insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana” if certain facts are established by the applicant. INA § 212(h).

## Hypothetical #1

- Lawful permanent resident Margaret
- Gets mad at Amazon delivery person walking through her finely manicured front yard
- Shoots a gun as the delivery person leaves; bullet goes through the delivery van
- Charged with discharge of a firearm into an occupied vehicle (SC Code § 16-23-440(B)). This is a felony with a sentence up to 10 years.

## Hypothetical #1: Possible Pleas

- Discharge into an occupied vehicle: Assault and battery? Firearms offenses?
- Aggravated breach of peace

## Hypothetical #2

- Mario is in the United States with no legal status
- Mario’s employer has an audit of their I-9 forms conducted by federal immigration officials
- They discover that Mario has given the employer a name and social security number belonging to someone else
- Mario is charged with forgery, S.C. Code § 16-13-10(C). This is a misdemeanor with a maximum possible sentence of 3 years.

## General Recommendations for Defense Attorneys

- PTI is GOOD. Conditional discharge is bad.
- Any drug conviction is bad.
- Violent crimes are bad.
- Look at the list of aggravated felonies on the handout. These are the worst crimes.
- Always know your client’s citizenship.
- Always advise non-citizen clients that a conviction could affect their immigration status. Call for help.

## Immigration Hold / Detainer

[illegible][illegible]

U.S. Department of Homeland Security		<b>Notice of Custody Redetermination</b>			
_____ _____ _____	_____ _____ _____	Agent No: <b>00614</b> File No: <b>0035-8</b> Date: <b>02/23/2014</b> F20: _____			
<p><b>1. History</b>          DOTS: <b>CANADA</b>.</p>					
<p>Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the immigration judge in your case, and, in the event your case is ordered removed from the United States, until you are taken into custody for removal, you shall be:</p>					
<p><input type="checkbox"/> Detained in the custody of the Department of Homeland Security.</p> <p><input checked="" type="checkbox"/> Released on bond in the amount of <b>\$ 3,000.00</b>.</p> <p><input type="checkbox"/> Released on your own recognizance.</p>					
<p><input checked="" type="checkbox"/> You may request a review of this determination by an immigration judge.</p> <p><input type="checkbox"/> You may not request a review of this determination by an immigration judge because the Immigration and Nationality Act prohibits your release from custody.</p>					
<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; padding: 5px;"> <b>6.3011 - INSPECTION CODE</b>              (Signature of authorized official)              _____            (Date of authorization)              _____         </td> <td style="width: 50%; padding: 5px;">           RELEASE            _____            (Signature)            _____            (Date)         </td> </tr> </table>				<b>6.3011 - INSPECTION CODE</b>  (Signature of authorized official)  _____ (Date of authorization)  _____	RELEASE _____ (Signature) _____ (Date)
<b>6.3011 - INSPECTION CODE</b>  (Signature of authorized official)  _____ (Date of authorization)  _____	RELEASE _____ (Signature) _____ (Date)				
<p><input type="checkbox"/> Do not request a redetermination of this custody decision by an immigration judge.</p> <p><input checked="" type="checkbox"/> I acknowledge receipt of this notification.</p>					
<p>(Signature of respondent) _____ (Date) _____</p> <p><b>RESULT OF CUSTODY REDETERMINATION</b></p> <p>On _____, custody status/conditions for release were reconsidered by:</p> <p><input type="checkbox"/> Immigration Judge    <input type="checkbox"/> DHS Official    <input type="checkbox"/> Board of Immigration Appeals</p> <p>The results of the redetermination/reconsideration are:</p> <p><input type="checkbox"/> No change - Original determination upheld.    <input type="checkbox"/> Release - Original Recognizance</p> <p><input type="checkbox"/> Explain in detail of this Service.    <input type="checkbox"/> Release - Personal Recognizance</p> <p><input type="checkbox"/> Bond amount - \$ ____    <input type="checkbox"/> Other: _____</p>					
<p>_____          (Signature of officer)</p>					

## The Detention and Removal Process

- Immigration Hold/Detainer
- Notice to Appear (NTA)
- Immigration Bond Process
- Immigration Court Process
- Airport Detention/NTA for LPRs

# Complexities of Immigration Law

### Unlawful presence

- If the person entered without inspection, must depart and consular process
- If the person has more than one year of unlawful presence in the U.S, the person cannot return to the U.S. for 10 years
- Waiver for unlawful presence available for some people (not eligible for if a second unlawful entry)

## Complexities of Immigration Law

Many other reasons visas can be denied:

- Criminal history
- Public charge
- Prior misrepresentations
- Prior deportation

## Issues in the News: Asylum

A person who “is unable or unwilling to return to, and is unable or unwilling to to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A) [8 U.S.C. § 1101(42)(A)].